

Decision 02-02-041 February 21, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Edison Company (U338-E) for Authority to Lease Available Land on the Gould-Mesa Transmission Right of Way to Gangi Development, Inc.

Application 01-12-004
(Filed December 5, 2001)

**OPINION GRANTING APPROVAL UNDER PUBLIC UTILITIES CODE
SECTION 851 FOR CONVEYANCE OF A LEASE BY SOUTHERN
CALIFORNIA EDISON COMPANY TO GANGI DEVELOPMENT
COMPANY, INC.**

1. Summary

This decision grants the unopposed application¹ of Southern California Edison Company (Edison) for Commission authorization under Public Utilities Code § 851² for Edison to convey a lease on its property located on the Gould-Mesa Transmission Right of Way (Gould-Mesa ROW) in the City of Pasadena, California to Gangi Development Company, Inc. (Gangi). This lease will permit Gangi to operate a carwash on the site.

¹ The application was filed on December 5, 2001. In Resolution ALJ 176-3077, dated December 11, 2001, we preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings are unnecessary. No protests to the application were filed.

² All statutory references are to the Public Utilities Code unless otherwise referenced.

Our decision on this matter is expedited based on Edison's request for approval of the lease as soon as possible in order to obtain lease revenues for the benefit of ratepayers.

2. Background

A. The Parties

Edison is an public utility organized under the laws of the State of California, which engages in the business of electric generation, transmission, and distribution. As a public utility, Edison is subject to Commission regulation.

Gangi began its business operations as a Southern California-based construction company in 1947, and has since that time designed, developed, and managed projects including custom homes, larger residential communities and specialized commercial buildings.

B. The Project

Edison proposes to lease to Gangi approximately 1.36 acres on a portion of Edison's Gould-Mesa ROW in Pasadena, California. Edison uses this property as a site for above-ground transmission, subtransmission, and distribution lines. The Gould-Mesa ROW is part of the Gould-Mesa 220 kilovolt system and includes facilities subject to Commission jurisdiction. The property is not currently used for any secondary purpose.

If the lease is approved, Gangi will operate a full-service carwash on the site. Edison has previously determined that of all of the permissible uses that would be compatible with Edison's use of the property for utility operations, a full-service carwash would yield the highest potential revenue.

Gangi has obtained a conditional use permit (CUP) from the City of Pasadena (City) which approved the secondary use of the property as a carwash.

Edison represents that the proposed lease will not interfere with Edison's operation of its transmission, subtransmission and distribution lines on the property or interfere with its service to customers.

C. The Proposed Agreement between Edison and Gangi

Under the option agreement signed by Edison and Gangi on June 1, 2001 (agreement), Gangi may exercise its option to lease the property within 30 days of Gangi's receipt of the Commission order approving the lease, so long as Gangi has met certain conditions. The agreement includes the proposed lease terms.

The initial term of the proposed lease is 30 years. Edison and Gangi may renew the lease for up to two additional 10-year terms. The lease would generate a base rent of \$30,000 in the first year. The base rent would gradually increase to \$74,500 in the 10th year.³ The base rent will be adjusted by appraisal to reflect the

³ The base rent for the first 10 years of the lease would be as follows:

Year 1	\$30,000
Year 2	\$53,000
Year 3	\$55,500
Year 4	\$58,000
Year 5	\$60,600
Year 6	\$63,250
Year 7	\$66,000
Year 8	\$68,750
Year 9	\$71,500
Year 10	\$74,500

fair market rental value of the property upon the expiration of every 10th year of the lease term.

Under the agreement, Gangi must use the property in a manner that does not interfere with Edison's use of its power lines and equipment and that complies with Commission and legal requirements. Edison has reserved the right to enter the property as necessary to clean or perform work on its electrical facilities and to protect its electrical facilities in an emergency. Gangi may not interfere with Edison's access or movement of equipment and materials over the property. Edison has further reserved the right to license portions of the property to third parties for cell sites and the placement of billboards. If necessary to serve a public purpose, Edison may condemn all or part of the leased property during the lease term.

Under the agreement, Edison must approve the plans and specifications for any improvements that Gangi wishes to construct on the site.

Gangi must maintain the property and improvements in good condition and use the property safely. The agreement requires clearances of at least 17 feet between Gangi's equipment and improvements and Edison's overhead electrical conductors, at least 50 feet from all tower legs and at least 10 feet from all steel poles, wood poles and anchors. Gangi may not utilize the area directly under Edison's towers without Edison's written consent. Gangi also may not use, permit, create, store or allow hazardous substances on the property⁴ and may not

⁴ Under the agreement, Gangi is responsible for the entire cost of removal of any hazardous substances on the property during the lease term, except for hazardous materials placed on the site by Edison, and for the clean-up and decontamination of any neighboring properties necessitated by Gangi's use or placement of hazardous materials on the site.

use or store gasoline or petroleum products (except for fuel stored in the tank of an operable vehicle) or flammable materials on the property. In addition, Gangi may not permit hazardous or objectionable fumes, smoke, vapors, or odors to rise above the surface of the property. Edison may require Gangi to provide and maintain access roads on the site.

In the agreement, Gangi acknowledges that any structures it constructs on the property will be in close proximity to one or more high voltage (66 kilowatt or higher) electric transmission lines or substations. Gangi's structures may therefore be susceptible to induced voltages, static voltages or related electric fault conditions (induced voltages), unless appropriate grounding or other mitigation measures are incorporated into the structures. Gangi has agreed to assume responsibility for identifying and implementing appropriate mitigation measures to reduce this risk.

In addition, Gangi shall indemnify and defend Edison from any claims for liability for damage or injury to persons or property on or about the site, except to the extent such claims are caused by Edison's negligence or willful misconduct. Gangi has also specifically agreed to indemnify and defend Edison for any claims arising from or connected to induced voltages or from Gangi's construction of improvements on the site. In order to further protect Edison

Edison represents in the agreement that it does not know, or have reasonable cause to believe, that any release of hazardous substances exists on or beneath the property. Under the agreement, Gangi has the right to inspect the property, review relevant Edison documents, and analyze the soil and ground water to determine if hazardous materials exist on the site before exercising its option to lease. If Gangi enters into the lease, Gangi is deemed to have approved the condition of the property.

from liability, Gangi is required to provide Edison with evidence of adequate insurance coverage before executing the agreement or entering the property.⁵

The agreement would permit Gangi to assign, transfer, sublease or mortgage the lease, without the prior consent of the Commission. Under the agreement, Gangi may also change the use of the site to any legally permitted use that will not interfere with Edison's utilization of the property for its power lines and equipment, without Commission approval.

Any disputes between the parties that cannot be resolved through good faith negotiations will be subject to arbitration.

D. Environmental Review

The California Environmental Quality Act (Public Resources Code Section 21000, et seq., hereafter "CEQA") applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to "inform governmental decision-makers and the public about the potential, significant environmental effects of the proposed activities." (Title 14 of the California Code of Regulations, hereinafter "CEQA Guidelines," Section 15002.)

Since the proposed carwash project is subject to CEQA and the Commission must issue a discretionary decision without which the project cannot proceed (i.e., the Commission must act on the Section 851 application), this Commission must act as either a Lead or a Responsible Agency under

⁵ The required insurance coverage includes all-risk insurance covering Gangi's improvements on the property, all-risk builder's insurance covering Gangi's construction of improvements, commercial general liability insurance, commercial auto insurance, and workers compensation/employer's liability insurance. Gangi must provide Edison with certificates of insurance which document that this coverage will not be cancelled, allowed to expire, or materially reduced without 30 days' advance written notice to Edison.

CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA Guidelines Section 15051(b)).

In this instance, the City is the Lead Agency for Gangi's car wash project. The CUP granted to Gangi by the City includes a finding that the project is categorically exempt from CEQA review as an in-fill project.⁶ The City also prepared a Notice of Exemption for the project on September 7, 2001 and submitted it to the Los Angeles County Clerk for posting.⁷

⁶ A project is categorically exempt from CEQA review as an in-fill development project (Class 32) if it meets the following requirements:

- (a) The project is consistent with the applicable general plan description and all applicable general plan policies, as well as with applicable zoning designation and regulations;
- (a) The proposed development occurs within city limits on a site of no more than 5 acres which is substantially surrounded by urban uses;
- (a) The project site has no value as habitat for endangered, rare or threatened species;
- (a) Approval of the project will not result in any significant effects relating to traffic, noise, air quality or water quality;
- (a) The site can be adequately served by all required utilities and public services.

State CEQA Guidelines Section 15332.

⁷ Under CEQA, the lead agency may, but is not required, to prepare a notice of exemption and to submit the notice to the County Clerk for posting. After the notice has been posted for 30 days, the County Clerk must return the notice to the lead agency with a notation of the period in which it was posted. If this procedure is followed, the statute of limitations for challenging the project on CEQA grounds is limited to 35 days, rather than the otherwise applicable 180 day statute of limitations.

In this case, the Commission is a Responsible Agency under CEQA. As a Responsible Agency, the Commission's role in Section 851 cases generally involves review of the environmental consequences of a project as part of its discretionary approval of the application, after considering any negative declaration or environmental impact report prepared by the Lead Agency.

However, here, since the Lead Agency determined that the project is categorically exempt, the project is not subject to CEQA requirements and may be implemented without any additional CEQA review by the Commission.⁸ We have reviewed the CUP and Notice of Exemption prepared by the Lead Agency and find nothing which suggests that the Lead Agency's determination of exemption was incorrect. We therefore need not consider further any environmental consequences of granting the application in this case.

Copies of the Conditional Use Permit and Notice of Exemption are attached as Appendices A and B, respectively.

E. Ratemaking Considerations

Edison proposes to treat revenue from the proposed lease as other operating income (OOR). This treatment of lease revenues easement is unopposed.

In D.99-09-070, the Commission adopted a gross revenue sharing mechanism for certain of Edison's other operating revenues. The adopted gross revenue sharing mechanism applies to OOR, except for revenues that: (1) derive from tariffs, fees or charges established by the Commission or Federal Energy

⁸ See Association for Protection of Environmental Values in Ukiah v. City of Ukiah, 2 Cal. App. 4th 720, 730 (1991); Meridian Ocean Systems, Inc., v. California State Lands Commission, 222 Cal. App. 3d 153, 159 (1990).

Regulatory Commission, (2) are subject to other established ratemaking procedures or mechanisms, or (3) are subject to the Demand-Side Management Balancing Account. Under the gross revenue sharing mechanism, all applicable gross revenues recorded from non-tariffed products and services will be split between shareholders and ratepayers after the Commission-adopted annual threshold level of OOR has been set. For those non-tariffed products and services deemed “active” by the Commission, revenues in excess of the annual threshold will be split between shareholders and ratepayers on a 90%/10% basis. For those non-tariffed products and services deemed “passive” by the Commission, the revenues in excess of the annual threshold will be split between shareholders and ratepayers on a 70%/30% basis.⁹

Here, the proposed lease with Gangi would be treated as “passive,”¹⁰ so that any lease revenues which exceed the annual threshold would be allocated between shareholders and ratepayers on a 70%/30% basis.

⁹ Under the settlement approved in D.99-09-070, an existing product or service is classified as “active” if it involves a total incremental shareholder investment of \$225,000 or more, either on a one-time basis or within a 12-month period. An existing product or service is classified as “passive” if it involves a total incremental shareholder investment of less than \$225,000. “Incremental shareholder investment” includes capital-related costs and expenses. Capital-related costs, labor and other expenses properly charged to the utility shall not be included in calculating the \$225,000 threshold.

Each new category of products or services is presumed to be “passive.” To reclassify an existing product or service as “active”, or a new product or service as “active”, Edison must file an advice letter which shows that the product or service involves incremental shareholder investment of at least \$225,000 either on a one-time basis or within a 12-month period. Edison may file only up to 4 advice letters per year for this purpose.

¹⁰ D.01-12-014; D.01-08-022.

3. Discussion

Section 851 provides that no public utility “shall . . . encumber the whole or any part of . . . property necessary or useful in the performance of its duties to the public, . . . without first having secured from the Commission an order authorizing it to do so.” Since the proposed lease would be an encumbrance on Edison property, we must apply Section 851 in considering this application.¹¹

The primary question for the Commission in Section 851 proceedings is whether the proposed transaction is adverse to the public interest. The public interest is served when utility property is used for other productive purposes without interfering with the utility’s operation or affecting service to utility customers.¹² In reviewing a Section 851 application, the Commission may “take such action, as a condition to the transfer, as the public interest may require.”¹³

We find that Edison’s conveyance of the proposed lease to Gangi will serve the public interest. The lease will generate substantial OOR for the benefit of ratepayers. The terms of the agreement between Edison and Gangi are reasonable and appear not to subject Edison to undue potential liability that could affect Edison’s ability to provide utility service to the public. The proposed lease will not interfere with Edison’s use of the property or with service to Edison customers, and the property will be utilized safely and in a manner consistent with Commission and legal requirements.

We are concerned that the agreement would permit Gangi to assign, transfer, sublease or mortgage the lease, or to change the use of the leased

¹¹ D.01-08-069.

¹² D.00-07-010 at p. 6.

¹³ D.3320, 10 CRRC 56, 63.

property to any other legally permitted use, without prior Commission review. However, the agreement does require Gangi to notify Edison in advance before taking any of these actions. We will therefore address these concerns by requiring Edison to apply for Commission authorization pursuant to Section 851 for any proposed assignment, transfer, sublease or mortgage of the lease by Gangi that would alter the terms of the existing lease and for any proposed change in the use of the leased property.

We also approve of the proposed ratemaking treatment for the compensation that Gangi will pay to Edison for the lease. The treatment of this compensation as OOR and of the lease as a “passive” source of revenue is consistent with prior Commission decisions and policy.

4. Conclusion

For all of the foregoing reasons, we grant the application of Edison pursuant to Section 851, effective immediately.

5. Final Categorization and Waiver of Review Period

Based on our review of this application, we conclude that there is no need to alter the preliminary determinations as to categorization and need for a hearing made in Resolution ALJ 176-3077 (December 11, 2001). Moreover, since this proceeding is uncontested and we grant the relief granted, pursuant to Section 311(g)(2), the otherwise applicable 30-day period for public review and comment is waived.

Findings of Fact

1. Our consideration of this application is expedited based on representations that Edison wishes to obtain approval of the lease as soon as possible in order to obtain lease revenues that will benefit ratepayers.

2. The proposed lease will not interfere with Edison's use of the property or with service to Edison customers, and the property will be utilized safely and in a manner consistent with Commission and legal requirements.

3. The City is the Lead Agency for Gangi's proposed carwash project under CEQA.

4. On September 17, 2001, the City issued a Notice of Exemption, which stated that the proposed carwash project is categorically exempt from CEQA review as an in-fill development project pursuant to State CEQA Guidelines Section 15332.

5. On October 12, 2001, the City granted Gangi a CUP, which also found that the proposed carwash project is categorically exempt from CEQA as an in-fill development project.

6. The Commission is a Responsible Agency for the purposes of environmental review of the proposed lease under CEQA.

7. Upon review of the Lead Agency's CUP and Notice of Exemption, the Commission finds nothing which suggests that the Lead Agency's determination that the project is categorically exempt from CEQA is incorrect.

8. Compensation received by Edison from Gangi for the proposed lease will be treated as OOR from a "passive" revenue source and will be allocated between shareholders and ratepayers pursuant to D.99-09-070.

9. The proposed lease will generate substantial lease revenues for the benefit of Edison ratepayers.

Conclusions of Law

1. Since the City determined that the carwash project is categorically exempt from CEQA as an in-fill development project, the Commission need not further consider the environmental effects of granting this application under CEQA.

2. Consistent with Section 851, Edison's conveyance of the lease to Gangi will serve the public interest and should be authorized.

3. This decision should be effective today in order to allow the lease to be conveyed to Gangi expeditiously.

O R D E R

IT IS ORDERED that:

1. Southern California Edison Company (Edison) is authorized to convey a lease across its Gould-Mesa Transmission Right of Way property in the City of Pasadena, California to Gangi Development Company, Inc. (Gangi) as described in this decision.

2. Edison shall treat compensation received from Gangi for the lease as other operating revenue received from a "passive" revenue source pursuant to Decision 99-09-070.

3. Edison shall amend its option agreement and any subsequent lease with Gangi to require advance Commission approval of any proposed assignment, transfer, sublease, or mortgage of the lease that would alter the lease terms or any change in the use of the property to other than a full-service carwash.

4. When final lease documents are executed, Edison shall submit a copy by advice letter filing within sixty (60) days of this order.

5. This proceeding is closed.

This order is effective today.

Dated February 21, 2002, at San Francisco, California.

LORETTA M. LYNCH
President

HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners